

United States Senate

WASHINGTON, DC 20510

January 11, 2019

Mr. Michael E. Horowitz
Inspector General
U.S. Department of Justice Office of the Inspector General
950 Pennsylvania Avenue, NW, Suite 4706
Washington, D.C. 20530

Dear Inspector General Horowitz:

We write as members of the Senate Judiciary Committee to request that you take immediate action to review the process and procedures by which the Department of Justice (DOJ) assesses conflicts of interest by senior political appointees, and how any determinations regarding the need for recusals are being enforced and monitored. Acting Attorney General Matthew Whitaker's decision to disregard the advice of career DOJ ethics officials to recuse himself from oversight of Special Counsel Robert Mueller indicates that DOJ's internal ethics procedures have failed. Not only does this raise serious concerns about Mr. Whitaker's current actions as Acting Attorney General, but it also calls into question DOJ's ethics procedures to assess and address potential conflicts of William P. Barr, President Trump's nominee to be Attorney General. We strongly believe that Department officials should be bound by the ethics advice they receive.

As you know, DOJ attorneys are subject to the Ethics in Government Act and associated regulations, DOJ regulations requiring disqualification from matters involving close personal or political relationships, and rules of professional conduct. DOJ's ethics program is administered by the Designated Agency Ethics Official (DAEO), the Assistant Attorney General for Administration, and the Departmental Ethics Office.¹ Upon a nominee's confirmation, it is DOJ's responsibility to memorialize and enforce recusals agreements or any other procedures necessary to prevent a DOJ official from participating in matters in which he or she has a conflict of interest. When this process is circumvented—or ignored—we cannot have confidence that our nation's top law enforcement officials are discharging their duties free of inappropriate conflicts of interest.

Congress has raised alarms about Mr. Whitaker's conflicts of interest as Acting Attorney General. On November 11, 2018, Democratic leaders from the House and Senate wrote to DOJ DAEO Lee Lofthus asking, among other things, whether any "ethics officials at the Justice Department ... have advised Mr. Whitaker to recuse from supervision of the Special Counsel investigation, ... the basis for that recommendation, [and] all ethics guidance the Department has provided to Mr. Whitaker to date." On December 4, 2018, Senate Judiciary Committee Democrats wrote to Mr. Lofthus and Stacy Ludwig, Director of DOJ's Professional Responsibility Advisory Office, reiterating that request and asking for further information about DOJ's assessment of potential conflicts arising from Mr. Whitaker's work for the Foundation for Accountability and Civic Trust (FACT), an organization that filed at least 14 complaints in recent years against Democratic politicians, and has spent thousands of dollars on contracts with

¹ See DOJ Order 1200.1, part 11, chapter 11-1.

conservative political attack groups.² That letter raised particular concerns about anonymous donations that supported FACT's activities, and inquired whether ethics officials would obtain and evaluate that information in the course of their review.

DOJ advised Congress on December 20 that Mr. Whitaker had chosen not to recuse himself from the Special Counsel investigation despite the conclusion by career ethics officials that he should be recused because "a reasonable person with knowledge of the relevant facts" would likely question his impartiality. The *Washington Post* reported that rather than following this advice Mr. Whitaker convened his own set of advisors, whose identities remain unknown, who came to a different conclusion.³ DOJ has not responded to the Senators' December 4, 2018, letter. As it stands right now, Mr. Whitaker continues to serve as the nation's chief law enforcement officer having rejected the only official ethics advice we are aware he received. We believe that Department officials must follow the ethics advice provided.

We will soon be asked by the President to provide our advice and consent to his nomination of William Barr to be Attorney General. Mr. Barr's record, including statements and opinions that he has expressed regarding Special Counsel Mueller's investigation, will be explored by Congress in the course of his confirmation, and will also warrant consideration by the Department's career ethics officials if he is confirmed. This heightens the need to ensure that process and procedures by which DOJ assesses conflicts of interest of senior political appointees is adequate and that adherence to DOJ standards and guidance is appropriately monitored and enforced.

One of your mandates under the Inspector General Act of 1978 is to keep "the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action."⁴ Consistent with that mandate and OIG's past efforts related to DOJ's ethics program,⁵ we request that you promptly assess any problems and deficiencies in DOJ's ethics program as it pertains to senior political appointees. That assessment should cover DOJ procedures for obtaining and reviewing information about anonymous or otherwise non-public funding for a nominee's previous work that could cause conflicts of interest.

² <https://www.whitehouse.senate.gov/news/release/senators-press-justice-department-on-whitaker-benczkowski-conflicts-of-interest>. In that letter, Senators also raised concerns that DOJ has not been completely forthcoming with its ethics assessment of Assistant Attorney General Brian Benczkowski despite repeated requests for information.

³ Devlin Barrett and Matt Zapotosky, *Ethics official said Whitaker should recuse from the Mueller probe, but his advisers told him not to, officials say*, WASHINGTON POST, Dec. 20, 2018, available at https://www.washingtonpost.com/world/national-security/ethics-officials-say-whitaker-need-not-recuse-from-supervising-special-counsel-probe-according-to-a-person-familiar-with-the-matter/2018/12/20/76332392-046b-11e9-b5df-5d3874f1ac36_story.html?utm_term=.195d906f4852.

⁴ 5 U.S.C. (IG Act) App. § 2(3).

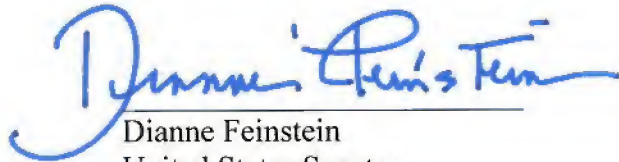
⁵ See, e.g., U.S. DEPT. OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, OVERSIGHT AND REVIEW DIVISION 18-04, A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION (June 2018) (reviewing, *inter alia*, ethics decisions by Attorney General Loretta Lynch, Assistant Attorney General Peter Kadzik, and FBI Deputy Director Andrew McCabe).

The poor judgment Mr. Whitaker demonstrated in rejecting the advice of career ethics officials should not establish a precedent for Mr. Barr or any other a senior DOJ official to similarly disregard the independent assessment of conflicts of interest by career DOJ staff under the Department's existing procedures. An OIG report will help inform the Judiciary Committee's ongoing oversight into DOJ and future advice-and-consent responsibilities.

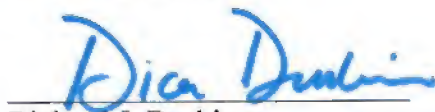
Sincerely,



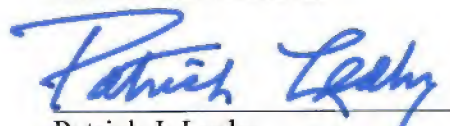
Sheldon Whitehouse
United States Senator



Dianne Feinstein
United States Senator



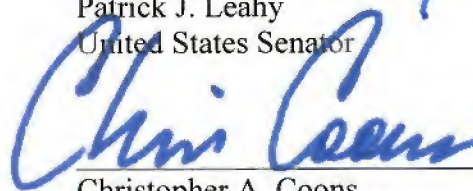
Richard J. Durbin
United States Senator



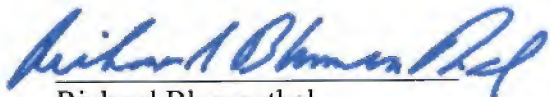
Patrick J. Leahy
United States Senator



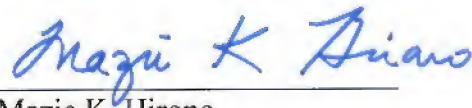
Amy Klobuchar
United States Senator



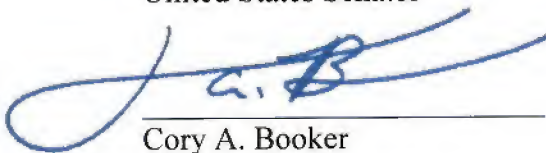
Christopher A. Coons
United States Senator



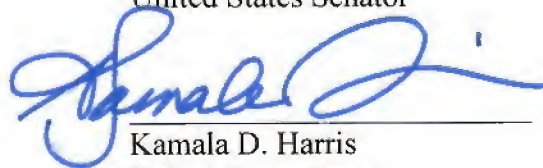
Richard Blumenthal
United States Senator



Mazie K. Hirono
United States Senator



Cory A. Booker
United States Senator



Kamala D. Harris
United States Senator